IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 72

THE UNITED STATES, *Petitioner*,

v.

STANDARD RICE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims (R. 37-41) is reported in 53 F. Supp. 717.

JURISDICTION.

The judgment of the Court of Claims was entered February 7, 1944. The petition for a writ of certiorari was filed on April 28, 1944. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

The question involved is whether respondent should be denied the right to recover amounts withheld by the Comptroller General from admitted overpayments of income taxes because of an alleged indebtedness for processing taxes on rice furnished the United States under a contract which provided:

> "Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

The respondent did not pay the processing taxes on the rice supplied because their collection was permanently enjoined following the Supreme Court decision that the Agricultural Adjustment Act was unconstitutional.

STATUTES INVOLVED.

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U. S. C., Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

> SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agricul-

ture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture * * * (7 U. S. C., Sec. 609).

MISCELLANEOUS

SEC. 10. * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * * * * * * * *

(7 U. S. C., Sec. 610)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * * (7 U. S. C., Sec. 611).

Revenue Act, 1936, c. 690, 49 Stat. 1734:

SEC. 501. Tax on Net Income from Certain Sources.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid, which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed. * * *

(c) The net income from the sales specified in subsection (a)(1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis, the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from such sales the allocable portion of the deductions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a)(1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross

income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary. * * *

(e) For the purposes of subsection (a)(1), (2), and (3) the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement specified in subsection (a)(2)) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "average margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

(3) The term "selling price" means selling price minus (A) amounts subsequently paid or credited to the purchaser on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936, as reimbursement for the amount included in such price on account of a Federal excise tax; and minus (B) the allocable portion of any professional fees and expenses of litigation incurred in securing the refund or preventing the collection of the Federal excise tax, not to exceed 10 per centum of the amount of such tax.

(g) In determining costs, selling prices, and net income, the taxpayer shall, unless otherwise shown, be deemed to have sold articles in the order in which they were manufactured, produced, or acquired. Where the taxpayer's records do not adequately establish the quantity of a commodity taxable under the Agricul-

tural Adjustment Act, as amended, entering into articles sold by him, such quantities shall be computed by the use of the conversion factors prescribed in regulations under such Act, as amended. * * *

"(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or materials, or (B) in costs of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

(2) Proof that the taxpayer modified contracts of sale, or adopted a new contract of sale, to reflect the initiation, termination, or change in amount of the Federal excise tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the taxpayer may establish that such acts were caused by factors other than the tax, or that they do not represent his practice during the period in which the articles in question were sold.

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

(3) The term "refund or credit" does not include a refund or credit made in accordance with the provisions and limitations set forth in Title VII of this Act, or in section 621 (d) of the Revenue Act of 1932.

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

(5) The term "taxpayer" means a person subject to a tax imposed by this section. * * *.

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held

invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

STATEMENT.

Respondent, a corporation engaged in the business of milling rice for sale, as a first domestic processor of rice, paid the processing taxes imposed by the Agricultural Adjustment Act of May 12, 1933, as amended, from April 1, 1935 to September 20, 1935. Before paying the processing tax on the rice processed for the month of October, 1935, respondent applied to and obtained from the United States District Court for the Western District of Texas (No. 577 in Equity) an injunction against the Collector of Internal Revenue, prohibiting the collection from it of any further processing taxes, and no processing taxes were paid by the respondent after the month of September, 1935 (R. 33, 35).

On November 13, 1935, respondent entered into a contract with petitioner under which respondent agreed to supply rice to the Navy Department at bid prices specified in the contract, under which respondent delivered the total quantity of 584,000 pounds of milled rice in December, 1935, January, February and March, 1936, and received full payment therefor. A typical price provision of said contract read as follows:

Item	Pounds (about)	Unit Price (per pound)	Total
1. Rice	290,000	.046	$13,340.00

(R. 35)

The contract contained the following provision:

"Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may here-

after (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." (R. 35)

The Comptroller General, on behalf of the United States asserted claim in the amount of $8,479.60 against respondent for unpaid processing taxes on said contract. (R. 35, 36)

The Comptroller General withheld the sum of $2,334.23 against an overassessment of income taxes, duly authorized by the Commissioner of Internal Revenue, for the respondent's fiscal year ended July 31, 1935, and the sum of $6,145.37 against an overassessment of income taxes for the claimant's fiscal year ended July 31, 1938. The Comptroller General credited said sums against the alleged indebtedness for processing taxes under the contract here involved. (R. 33, 34, 36)

Claims for refund of said sums were duly filed with the Commissioner of Internal Revenue and have never been denied. (R. 34)

Respondent paid its unjust enrichment taxes upon the basis of the inclusion of the units involved in the claim of the Comptroller General. Exclusion of such units would reduce said unjust enrichment taxes in the amount of $1,706.59. (R. 37)

No portion of the overpayments of income tax for the fiscal years ended July 31, 1935 and July 31, 1938, which were withheld by the Comptroller General as credits against alleged indebtedness for processing taxes have ever been refunded or repaid otherwise. (R. 37)

This suit was duly brought in the Court of Claims, and that Court, on February 7, 1944, entered judgment in favor of respondent for $8,479.60 with interest. (R. 41)

ARGUMENT

The petitioner very definitely ties its request for the issuance of a writ of certiorari to the specific tax provision of the contract. This is apparent in the specification of errors of the petition (p. 7). The first specification refers to the alleged right to recovery of amounts paid "under the contract" and the second to the petitioner's overruled interpretation of the "contract provision". In other words, the petitioner founds its case on its rights under the contract and must stand or fall on the particular provision which was construed in the respondent's favor by the Court below.

The position of the petitioner in this regard is made yet more positive by the third and general specification of error in which it is said the Court below erred "in failing to enter judgment for the United States and dismissing the petition." Thus, the Government seeks dismissal of respondent's petition below without qualification. This would be possible only if the Government's theory of the contract could be sustained for the Government conceded that under no theory of unjust enrichment did it have any equity in the sum of $1,706.59 of the amount involved in the petition below (Petition p. 6, footnote and R. 37, 38). The arguments of the pefition must therefore be considered in the light of its basic premise.

The petitioner claims that the decision below is in conflict with "the principle" of the case of *United States v. Kansas Flour Mills Corporation*, 314 U. S. 212, where the contract in question provided:

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, *processing tax*, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or

supplies herein contracted for, then the prices named in this contract will be increased *or decreased* accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

It is true that the Supreme Court discussed the theory of unjust enrichment but it deliberately avoided any ruling on the point. The decision in the *Kansas Flour Mills* case was directed specifically to the contention of the respondent therein that its retention of the full price was inevitable under the contract. The Supreme Court carefully spelled out its reasoning that this was not true since the so-called "up and down" clause covered a "change" in "processing taxes" recognized and confirmed by Congress within the meaning of the contract. 314 U. S. 217, 218. The Government thus was within its rights in its actions under the contract in the *Kansas Flour Mills* case.

Here the "change" provision of that case is absent. There is also no express mention of processing taxes in the tax clause and the Court below emphasized that nothing in the contract or any proved circumstance of the contract showed that the parties had it in mind. Furthermore, the express provision that new federal taxes should be billed to the Government gives strong support to the petition of respondent that the reverse should not be implied in the silence of the parties. The result of the retention of the full price is consequently inevitable under this contractual provision as the Court below held. The Government contract is not to be removed from the general law of contracts and its construction must be on that basis.

The decision in the *Kansas Flour Mills* case is not, therefore, in conflict with the decision of the Court below. Both decisions are based upon specific tax clauses, vastly different in their implications, and the fact that the Supreme Court adhered to a contractual theory in its reasoning supports the conclusion of the Court below.

As another reason for granting the writ the petitioner maintains that the decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *American Packing & Provision Co.*, 122 F. (2d) 445, certiorari denied, 314 U. S. 694. In that case many types of contracts were involved and the Court conceded that "if the right of the Government to recover is dependent upon the contracts between the parties, it must fail". Moreover, the opinion relates (at p. 449): "Indeed, the Government did not plead the contracts between the parties as a basis for its right to recovery * * *". The rights of the Government were determined upon equitable principles under the law of the State of Utah.

That is quite a different situation from this case in which the petitioner pleads error in the Court below on the basis of its interpretation of the contract provision involved and its failure to dismiss the respondent's petition without reference to the portion of the petitioner's claim in which the Government conceded it had no equity whatsoever. On the respective procedures and facts involved, there is no basis for an asserted conflict between the two decisions.

How little equity there is to support the Government's assertion is shown by the following facts:

(1) The tax clause itself, drafted by the Government, provides for no adjustment downward.

(2) The contract was entered into on November 13, 1935, at a time when courts everywhere were granting injunctions restraining collection of the processing tax following the decision of the Circuit Court of Appeals in *Butler* v. *United States*, 78 Fed. (2d) 1. The plaintiff did not pay the processing tax for October but obtained an injunction restraining its collection. This demonstrates the lack of any such understanding by the parties as that found by the Court in the *Kansas Flour Mills* case, where the contract expressly covered processing taxes.

(3) Contrary to the situation in either of the cases cited by petitioner the United States has irrevocably collected from respondent here an unjust enrichment tax in the sum of $1,706.59 on the very contracts involved. This tax imposed by Section 501 of the Revenue Act of 1936 was 80 per cent of the amount of unjust enrichment, so that the respondent was on that determination by the petitioner, under the elaborate standards expressly laid down by Congress, left with $341.34 of "unjust enrichment" funds compared to the $8,479.60 petitioner is seeking to retain here. Can such a claim be founded in justice and good conscience?

Such a determination of the amount of unjust enrichment by petitioner more than counterbalances any equity it can found solely upon the tax provision here involved.

Petitioner's effort to tie the *American Packing & Provision Company* case into the *Kansas Flour Mills* decision is necessarily and obviously speculative. That decision was plainly in line generally with the ultimate result of the *Kansas Flour Mills* case, and the denial of certiorari does not show that this court approved the same result in all contract cases regardless of the facts. At any rate, the denial of certiorari in the *American Packing & Provision Company* case can hardly be interpreted as authority for declaring the decision of the Court below to be in conflict with the decision of the Tenth Circuit Court, or with the decision of the Supreme Court in the *Kansas Flour Mills* case.

Finally, the petitioner submits the question involved is of considerable importance because there are "several hundred contracts" of a like nature. It is suggested that the number of contracts alone is no criterion of importance apart from the number of contractors concerned and the amounts involved. These the petitioner does not reveal; they may be few and the amounts small. It is hardly believed that this question is now of such general importance as to require the consideration of this Honorable Court.

CONCLUSION.

It is therefore respectfully submitted that the decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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